BEFORE THE CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU OF THE FEDERAL COMMUNICATIONS COMMISSION

IN RE:	)	
THE JOINT PETITION FILED BY DISH NETWORK, LLC, THE UNITED STATES OF AMERICA, and THE STATES OF CALIFORNIA, ILLINOIS, NORTH CAROLINA, AND OHIO FOR DECLARATORY RULING CONCERNING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA) RULES	)	
AND	)	
THE PETITION FILED BY PHILIP J. CHARVAT FOR DECLARATORY RULING CONCERNING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA) RULES	)	**CG DOCKET # 11-50**
AND	)	
THE PETITION FILED BY DISH NETWORK, LLC)FOR DECLARATORY RULING CONCERNING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA)RULES	)	

The States[1] Of California, Illinois, North Carolina and Ohio's Reply Comments to the FCC regarding CG Docket 11-50 and Filed on behalf of themselves and their Citizens

These reply comments are submitted by the States acting on behalf of their sovereign law enforcement interests and on behalf of their residents. The comments are submitted in accordance with the Consumer and Governmental Affairs Bureau of the Federal Communications Commission's April 4, 2011 Pleading Cycle Notice (DA 11-594) in which the Commission allows reply comments to Comments previously submitted to the Commission. The States have chosen to address its replies to the comments of DISH Network, LLC (DISH) , DIRECTV, Inc. (DIRECTV), American Telemarketing Association (ATA) and AT&T, Inc (AT&T) [for the purposes of this comment these four entities are collectively identified as the "Commentators"] in a single document because of the uniformity of themes contained in those comments.

Introduction

In their Comment filed on May 4, 2011, the States urge the Commission to interpret the

[1] For the purposes of this reply, the term "States" shall refer to the States of California, Illinois, North Carolina, and Ohio.

plain language of the Telephone Consumer Protection Act (TCPA or the Act)[2] in a common sense way that confirms that Sellers[3] cannot avoid liability for telemarketing calls by setting up creative marketing structures. Interpreting the TCPA in the unduly narrow way advocated by the Commentators would simply encourage Sellers to try to avoid complying with the consumer protections the TCPA provides by setting up marketing structures in which they obtain the same benefits of traditional telemarketing but without directly employing the telemarketers or establishing traditional agency relationships with them. This result harms consumers by depriving them of the full panoply of TCPA protections from do-not-call violations. Moreover, accepting the Commentator's interpretation also harms companies who are competing fairly, abiding by the law, and taking responsibility for their telemarketing instead of focusing their energies on setting up marketing structures designed to avoid liability. In short, there is no reason to limit the plain language of the TCPA, which contains no reference to nor any requirement for, the existence of an agency relationship between the physical dialer and the Seller. Instead, the Commission is urged to render its opinion confirming that the TCPA be enforced as holding both the Seller and physical dialer equally liable for violative calls.

The Commentators have uniformly taken a position that any interpretation of the TCPA should be skewed in favor of protecting certain Sellers rather than protecting the privacy rights of consumers who have placed their telephone numbers on the national Do-Not-Call list. These same consumers that the Commentators ignore, rely on the terms of the TCPA. The consumers have expended both time and effort in order to avoid the intrusive and persistent harassment of getting telephone solicitations from and on behalf of Sellers who the consumer has not specifically allowed the privilege of such contact. In fact, the Commentators ask the Commission to eviscerate its own statute and regulations by adding a huge layer of protection for Sellers who routinely attempt to "contract around" TCPA liability and involve themselves with persons and entities who solicit the Sellers' products and services and from whose efforts the Sellers do, in fact, benefit. In particular, the Commentators expect the Commission to provide them with a new safe harbor not included in or envisioned by the Act, essentially a "get out of jail free" card. That card would state that unless the regulators (the various state attorneys general and the Commission itself) can show that the Seller had an express agency relationship, or had complete control and direction over the dialer for the call, the Seller 1) is not liable for the call and 2) can accept the benefits resulting from the call. Such a result would be inequitable.

Discussion

The States took an even handed approach to their analysis of the plain language of the TCPA and the intents and purposes behind its implementation. In doing so, the States addressed the effect of the Commission's confirmation of the TCPA's language on both consumers and Sellers who adhere to the letter and spirit of the TCPA. Both of these groups are the

[2] 47 U.S.C. 227, see also 47 C.F.R. 64.1200.

[3] "The term [S]eller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. 64.1200(f)(7).

beneficiaries of the TCPA's protections. Perhaps unremarkably, the Commentators are unanimous in their approach to answering the Commission's Questions. That approach focuses on interpretations of the Act without regard for the effect of such an interpretation on either of the groups the TCPA intended to benefit. Instead of discussing the effects their interpretation will have on consumers who have placed their telephone numbers on the Do-Not-Call list and without regard for the intents and purposes of the TCPA, the Commentators focus on a parade of horrible effects that MIGHT befall only certain Sellers (who have adopted a specific marketing strategy) if the plain language interpretation, as supported by the States and the federal government, is confirmed by the Commission.

The ATA

As with the other Commentators, the ATA does not address how its position will affect the consumers who were to have benefitted from the TCPA and the Do-Not-Call list. It is however noteworthy that the ATA takes the position that any decision about this matter is of little practical importance to the industry[4]. If that is so, the Commission is urged to inquire no further and simply confirm the plain language of the TCPA as advocated by the States.

Despite its contention that an opinion is of little importance and while the ATA agrees that Sellers cannot simply outsource away their TCPA responsibilities, ATA's proposal abandons the confirmation of the plain statutory and regulatory language ("on behalf of" and "initiated") for a laundry list of fact intensive inquiries which must be made prior to assigning liability. ATA posits that only if a Seller remains intrinsically intertwined with "measuring and monitoring" third parties, can it possibly have any liability for violative calls. Such a reading is inconsistent with the plain language of the TCPA because, at the bare minimum, it provides a blueprint by which Sellers can avoid liability by simply ignoring the third party's activities while benefitting from the fruits of the poisoned tree.

On the other hand, ATA's conclusion seems to suggest that the Seller should be liable for calls when the Seller "fails to take certain measures to ensure compliance". If this is an accurate assessment of the ATA's position, it would appear that ATA supports a strict liability standard while arguing for an unsupportable expansion of the "safe harbor" defenses.

For these reasons, the States request that the Commission decline to incorporate the ATA's requests for what would amount to an expansion of the TCPA's safe harbor language.

AT&T

As is the case with the other Commentators, AT&T does not address the effect its position will have on the consumers the TCPA was implemented to protect. AT&T claims that the confirmation of the plain language of the TCPA as advanced by the States creates

[4] Roth, Mitchell N. Comments of the American Teleservices Association CG Docket 11-50 , May 4, 2011 (letter to Marlene H. Dortch, Secretary, Federal Communications Commission. Page 2.)

"unreasonable commercial risk"[5] to the Seller while ignoring the fact that rejection of that plain language interpretation would leave consumers completely vulnerable to any Seller with a legal staff capable of drafting contracts that purport to insulate the Seller from TCPA liability. Like its co-Commentators, AT&T focuses on one possible effect on one marketing strategy for one type of Seller when it suggests that the Commission should decline to confirm the plain language of the TCPA as advocated by the States.

The States note that the sole issue that seems to concern AT&T and the other Commentators is only created when a company adopts a business model which, in part or in full, attempts to intentionally isolate the Seller from the prospective customer. The model is specifically designed to allow such a Seller, while gaining a business advantage on other Sellers who comply rigorously with the TCPA, to claim it has no knowledge, nor any way to gain that knowledge, of any intermediary's marketing methodology. In fact, because of the relationship between the Seller and the intermediaries which includes payments to the intermediary for successful solicitations, it is always the Seller that is in the best position to, in an economically reasonable manner, determine whether solicitations were made by illegal means, and if so, terminate the offending intermediary and report the infractions of the intermediary to regulators.

For the reasons cited above, the Commission should reject AT&T's suggested interpretation of the TCPA's plain language.

DISH

Again, and without mention of the consumers who are protected under the TCPA, DISH presents arguments which, if accepted, effectively introduces new language into the Act and provides Sellers with protections never envisioned by Congressional intent or the purposes of the TCPA. In fact, DISH's arguments go so far as to present a methodology by which any Seller, while benefitting from violative telemarketing practices, could negate all of the TCPA's protections for the consumers who expect to receive the benefits of its provisions.

The "Big Box Store" and Related Issues

In part, DISH advises the Commission to reject the plain meaning of the TCPA, as proffered by the States, based on its evaluation of the liability imposed on Sellers in a hypothetical scenario. The crux of DISH's argument is that, if the States' position is confirmed, re-sellers and "big box" stores, when entering into a telemarketing campaign to advance generic sales in the store, would place Sellers, like DISH, at risk for violative phone calls.[6] In fact, the Seller of the product or service is liable for violation of the Act whether it dials the call itself or whether the call is made by a third party acting in a way which provides a benefit to the Seller. DISH's argument to exempt Sellers in this scenario is not supported by the plain language of the TCPA and, in fact, DISH argues for an unsupportable creation of a new "safe harbor" when re-sellers and other retail enterprises are part of the marketing scheme. Such a "safe harbor" does

[5] Marcus, Theodore, Comments of AT&T, Inc. May 4, 2011, Page6.
[6] Comments of DISH Network, LLC,, May 4, 2011, Page 3.

not appear in the TCPA nor can it be reasonably inferred from the Act's language.

Confirmation of the plain language of the TCPA, as advanced by the States, will result in an even handed interpretation advancing the intents and purposes of the TCPA while protecting consumers and Sellers committed to complying with the spirit and letter of the law. For these reasons, the States request that the Commission decline to accept DISH's invitation to extend "safe harbors" beyond what appears in the language of the Act.

DISH's Characterization that any Confirmation of the States' Plain Language Proposal by the Commission Would Be a Prohibited Constructive Rewrite of the TCPA

Another of DISH's arguments against the plain language interpretation advocated by the States and federal government appears to be that confirmation of the plain language would somehow expand the reach of the TCPA beyond its legislative intent[7]. For all the reasons cited in their May 4, 2011 Comment, the States are simply advocating that the plain and common sense language of the TCPA language be considered and applied in such a way as to give effect to the Act's intents and purposes. It is only under that interpretation that both consumers who take advantage of the TCPA's protections and businesses who abide by the spirit and letter of the law can be shielded from the harm violative telemarketing would produce.

Rather than the States' and federal government's position creating an extension of the Act, it is the Commentators' positions that constructively rewrite the TCPA. By inserting concepts of agency, direction and control into the Act, the Commentators create an exception that swallows the rule and one that cannot be supported by the plain language and direction provided by Congress.

For these reasons, the Commission is urged to refuse to adopt DISH's self serving objections to a plain language analysis of the TCPA and DISH's further attempt to have the Commission constructively rewrite the Act to favor Sellers that adopt DISH's business model.

DIRECTV

Although DIRECTV speaks of consumers, in general, and the horrible things that DIRECTV predicts may happen to the free market and those consumers who are accepting of telemarketing and who may benefit from telemarketing calls, DIRECTV, like the other Commentators, neglects to address the real harm its position will cause for those consumers who have taken the time and effort to place their numbers in the Do-Not-Call database.

[7] Id, at page 18.

Little Incentive to Comply with the TCPA?

DIRECTV appears to claim that if the TCPA were confirmed to mean that Sellers and those acting for their benefit are equally responsible for any violation, such an interpretation would have catastrophic consequences and potentially increase the number of violative calls made by third parties.[8] DIRECTV's analysis fails. Rather than shifting the responsibility for the penalties provided by the TCPA from the third party to the Seller as suggested by DIRECTV, in fact, the TCPA attributes liability to both the Seller and the third party with the purpose of incentivizing both parties to comply with and enforce the TCPA when it comes to telephone solicitations of the Sellers' products and services.

One result of, and reason for, attributing liability to both the Seller and the third party is that a third party, rather than exposing itself to the heightened scrutiny from a diligent Seller motivated to ensure no violations are attributed to it as a result of a third party's acts, will choose to either comply with the TCPA or cease using telemarketing as a business model. A second result of and reason for attributing liability to the Seller and third party is that the Seller, when faced with the liability for acts of a third party soliciting its products and services, will be much more diligent in making certain those third parties comply with the Act's requirements. Quite simply, there is no scenario where Sellers or consumers would continue to be at risk from any third party where a Seller diligently scrutinizes those marketing its products or services and terminates any third party that 1) breaches a contract which does not allow for the third party to telemarket but does so regardless of such terms; or 2) is contractually allowed to use telemarketing but uses a telemarketing business model that violates the TCPA.

With the Commission's confirmation of the plain language interpretation of the Act as supported by the States, third parties will be on clear notice that their actions expose both them and Sellers to sanctions and, as a result, a Seller would likely terminate its relationship with the third party based on violations of the TCPA. Sellers, knowing that third parties' actions subject them to sanctions, will more closely review new customers provided by those third parties and take appropriate action to protect itself and consumers who rely on the TCPA's protections. This is the clear intent and purpose of the TCPA, any other interpretation will not serve those aspirational goals.

Damage to Consumers

Unfortunately, DIRECTV uses certain consumers as red herrings, while continuing to ignore the damage done to consumers who avail themselves of the protections of the TCPA. DIRECTV claims that even the consumers harmed by receipt of violative calls will ultimately be further damaged as a result of the Commission's confirmation of the plain meaning of the Act. DIRECTV posits that such consumers will be faced with a lack of competitive choices[9], if the

[8] Comments of DIRECTV, INC,, May 4, 2011, Page 3-4. "If third parties conclude that blame and financial responsibility for their independent and illegal activities will be shifted to the seller, they will have little incentive to comply with the TCPA".

[9] Id. at pages 6 and 8.

TCPA's plain meaning and purposes are confirmed as requested by the States. DIRECTV suggests, if the plain meaning is confirmed, Sellers must abandon their business models that include independent retailers.[10] Such a characterization is hyperbole. Adherence to the TCPA neither requires a Seller to change its business model nor does it subject a Seller to egregious and capricious liability if it does not. The TCPA simply requires that the Seller makes certain that any party selling its services or products adhere to the Act's prescriptions.

DIRECTV suggests, without any basis, that Sellers would be forced to withdraw from retail sales streams and withhold locally available products and services to consumers if the Commission confirms the plain language of the TCPA as supported by the States. As stated previously, the enforcement of the TCPA does not require that any Seller pull its services or products out of any commercial stream. However, even under DIRECTV's scenario, rather than being overtly harmed by the enforcement of the TCPA as Congress intended, it is the Sellers who choose to pull out of the retail stream rather than enforce the Seller's contractual rights over third parties' behavior that would be the source of any inconvenience that some consumers may experience.

Certainly, the States would agree that if DIRECTV, or any other Seller, believes it is in its best interest to withdraw from the "independent" retail sales stream, it has the right to do so and is free to take that step. However, Sellers have other options available to them to limit their liability. For example, and not by limitation, Sellers have among their options, the option of terminating third parties that put the Seller and consumers at risk and replacing those third parties with others who do not participate in such risky practices. As stated in the States' May 4, 2011 Comment and supra, Sellers, as the ultimate beneficiaries of marketing programs, have a responsibility to monitor those using its name and good will. Sellers are also in the best position to determine whether any third party that solicits and/or sells the Seller's goods or services is doing so in a manner consistent with the TCPA.

For all the reasons cited above, the Commission should reject DIRECTV's suggested interpretation of the TCPA's plain language.

Conclusion

For all the above reasons, the States urge the Commission to decline the invitation of the Commentators to adopt DISH's, DIRECTV's. ATA's and AT&T's interpretation of the TCPA. The interpretation fomented by those Commentators attempts to shift the balance of benefits granted by the TCPA from the consumers who avail themselves of its protection and those Sellers who diligently follow the law, to Sellers who are inventive and ruthless enough to circumvent the plain language of the Act. Instead, the Commission is urged to uphold the purposes of the TCPA. First, the Commission is requested to confirm that the Act identifies the Seller as the initiator of the call. Thereafter, the States urge the Commission to confirm that the phrases "on behalf of" and "on whose behalf", subject to the reasonable and statutorily provided

[10] Id.

exceptions and safe harbors, hold the Seller strictly liable for calls made in violation of the Act, whether physically dialed by the Sellers themselves, their agents or ANY third party, when such call is made to a person and made for the purpose of encouraging the purchase or rental of, or investment in the Seller's, property, goods, or services, and where the party physically dialing the call identifies itself either as the Seller, or states expressly or by implication that it is acting for the Seller.

The foregoing reply comment is respectfully submitted, this the 19th day of May, 2011

FOR THE PEOPLE OF THE STATE OF CALIFORNIA KAMALA HARRIS Attorney General of the State of California Albert Norman Shelden Deputy Attorney General /s Albert Norman Shelden BY: Albert Norman Shelden Deputy Attorney General Consumer Law Section Office of the Attorney General 110 W. "A" Street, Suite 1100 San Diego, CA 92101-3702 Telephone: 619-645-2089 Fax: 619-645-2062 albert.shelden@doj.ca.gov	FOR THE PEOPLE OF THE STATE OF ILLINOIS LISA MADIGAN Attorney General of Illinois /s Elizabeth Blackston BY: Elizabeth Blackston, Assistant Attorney General; Chief, Consumer Fraud Bureau /s Jeffrey M. Feltman BY: Jeffrey M. Feltman Illinois Bar No. 06237048 Assistant Attorney General Consumer Fraud Bureau 1001 E. Main St. Carbondale, IL 62901-3100 Telephone: 618-529-6418 Fax: 618-529-6403 jfeltman@atg.state.il.us
FOR THE STATE OF NORTH CAROLINA BY: s/ Kevin Anderson KEVIN ANDERSON Special Deputy Attorney General Consumer Protection Division North Carolina Department of Justice P.O. Box 629 Raleigh, NC 27602 919-716-6052 kander@ncdoj.gov	FOR THE STATE OF OHIO MICHAEL DEWINE ATTORNEY GENERAL OF OHIO BY: s/ Erin B. Leahy ERIN B. LEAHY MICHAEL ZIEGLER Assistant Attorneys General Consumer Protection Section Ohio Attorney General's Office 30 East Broad St., 14th Floor Columbus, Ohio 43215 (614) 752-4730 Telephone (Leahy) (614) 466-3980 Telephone (Ziegler) ErinLeahy@OhioAttorneyGeneral.gov